

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue
San Francisco, CA 94102



December 11, 2000

John J. Davis, Jr.
Davis, Cowell & Bowe
100 Van Ness Avenue, 20th Floor
San Francisco, CA 94102

RE: Public Works Case No. 2000-011
Town Square Project
City of King

Dear Mr. Davis:

This constitutes the determination of the Director of the Department of Industrial Relations regarding coverage of the above-named project under the public works laws and is made pursuant to 8 California Code of Regulations (CCR) section 16000(a). Based upon my review of the documents submitted and the applicable laws and regulations pertaining to public works, it is my determination that the Town Square Project in the City of King is a "public works" within the meaning of Labor Code section 1720(a).

In February, 2000, the King City Redevelopment Agency ("Agency") entered into an Amended and Restated Disposition and Development Agreement ("DDA") with Town Square Partners, LLC ("Developer") for the construction of the Town Square Project ("Project"), a mixed-use commercial redevelopment project in the City of King ("City"). When completed, the Project will contain approximately 52,000 square feet of leasable space. The Project includes a 9,778 square foot multi-screen cinema, an 8,195 square foot child care center, a 24,000 square foot office and retail space, a 4,000 square foot restaurant and tasting room, a 10,000 square foot central plaza, parking, and a balcony linkage to the Hartnell College Education and Training Center ("Training Center").¹ The Developer has entered into a contract with Chris Madson Construction, Inc. ("Contractor") for the construction of

¹ The Agency will issue a Request For Proposal for the construction of the Training Center. Anticipated funding sources for the Training Center are a \$ 1.2 million Economic Development Administration grant and \$ 2.18 million in proceeds from Hartnell CCD Education and Training Center Bonds issued by the City. In light of the decision here, we need not reach the question whether the funds used to construct the Training Center constitute the payment of public funds for the Town Square Project. The Agency will require that prevailing wages be paid for the construction of the Training Center.

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the Project. Construction of the Project began in February 2000, and is expected to be completed within 18 months in accordance with the site plans and drawings proposed by Developer and approved by the Agency.

The over \$ 9 million Project is financed from the following sources: a private and a public loan to the Developer; Agency payment of certain costs; a real property conveyance by the Agency to Developer; Developer's private funds; and Agency purchase of the real property on which Developer is building the Project ("Project Site"). The private loan is an approximately \$ 3,540,000 construction loan from Community Bank of Central Coast. The public loan is an approximately \$ 3,882,500 loan from the Agency's King City Revolving Loan Fund for project financing gap to cover expenses such as project financing, developer profit, builder overhead and tenant inducements.

In order to acquire the Project Site, the Agency purchased various parcels from several private landowners. The Agency's total acquisition cost of the property, including the Project Site and the portion retained for the off-site parking and Training Center, business relocation compensation, legal fees and appraisal fees, is approximately \$ 2,345,000. The Agency represents that, while its offers to purchase the privately owned parcels were at fair market value as determined by the Agency's appraisers, the final purchase prices were at or above the initial fair market value offers. The Agency has also paid approximately \$ 298,500 for other costs associated with the acquisition of the real property, including legal fees and appraisers, engineering, and relocation costs.

The Agency conveyed approximately 68% of the total property it acquired, or approximately 105,000 square feet, to Developer for the Project. While Agency is unable to state precisely how much of the acquisition cost was expended for the Project Site, it calculates that 68% of the acquisition cost is \$ 1,600,000. The Agency holds a promissory note from Developer for \$1,072,500, which is the DDA Purchase Price. The Developer will not be required to pay the principal value of the promissory note, however, because the Agency has granted to Developer credits in the amount of \$ 1,072,500 under City's Performance Incentive Program ("PIP"). A description of the PIP states, inter alia, "The City of King is desirous of inducing business development... Qualified investors are to be rewarded with the equivalent of 'free land' to accommodate their business. It is recommended that all land sale transactions be at market value... Purchasers may negotiate an incentive package with the City which provides credits to offset the land cost."

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Labor Code section² 1720 generally defines public works to mean "Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds. . . ." Under section 1772, workers working for a contractor or subcontractor that is performing work in the execution of a public work are deemed to be employed on a public work.

The Project constitutes construction done under contract. The question whether the Project falls within section 1720(a)'s definition of public works thus depends upon whether it is paid for from public funds. An analysis of the nature of the Project funding sources follows.

Certainly, the Developer's private funds are not public funds. Similarly, under Title 8, California Code of Regulations, section 16000, "... 'public funds' do not include money loaned to a private entity where work is to be performed under private contract, and where no portion of the work is supervised, owned, utilized, or managed by an awarding body." Under section 1722, "awarding body" is defined as "the department, board, authority, officer or agent awarding a contract for public work." Here, neither the City nor the Agency is an awarding body because neither of the entities awarded a contract for the construction of the Project. Therefore, any control by City or Agency would not bring the loans within the exception provided under section 16000. For these reasons, the loans from the Community Bank of Central Coast and the King City Revolving Loan Fund do not constitute public funds.

The prominent issue is whether the credits extended by Agency to Developer under the PIP constitute payment of public funds for construction. Here, Agency offset the full amount of the promissory note with the credits it gave to Developer.³ As stated in the description of the PIP, Developer has been given "free land." The payment of public funds includes "'available pecuniary resources ordinarily including cash and negotiable paper' [citation], and in a legal context the courts have also taken it to include property of value which may be converted into cash [citations]. *Keene v. Keene* (1962) 57 Cal.2d 657, 663...." *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1588.⁴ The Agency

² Unless otherwise indicated, all "section" references are to the Labor Code.

³ The credits Agency gave Developer exceeded the amount of the promissory note on the Project Site.

⁴ See, also, Precedential Public Works Case No. 99-039, El Monte Riverview Business Center Office Building D, November 17, 1999.

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has therefore paid public funds when, under its PIP, it gave Developer property of value in the form of the Project Site.⁵

Agency argues that this arrangement would not make the Project a public work because, under *International Brotherhood of Electrical Workers v. Board of Harbor Commissioners* (1977) 68 Cal.App.3d 556 and *McIntosh*, the sale or lease of land by a public agency, including land sold at less than fair market value, would not be a public work requiring the payment of prevailing wages. As Agency notes, *IBEW* involved a lease under which the public entity received royalties in exchange for granting an oil development company the right to drill for oil and gas. There is no such arrangement in the present case, nor does Agency appear to be asserting that there is.

Agency's reliance on *McIntosh* is similarly misplaced. In that case, a county had an agreement with a contractor to waive inspection costs, forego rent on land, lend funds for bond premiums, and pay a per head amount for the later care of minors in the facility the contractor agreed to build. The Court held that rent forbearance, cost waivers, and loans are not payment of public funds, and that the agreement between the County and the contractor was essentially one for later services, not construction. Here, however, Agency has paid for site assembly costs and given Developer the Project Site.⁶ The information provided by the Agency indicates that the free land given Developer is part and parcel of the overall agreement between the Agency and the Developer for the construction of the Project. The PIP Credit Advance calculation for Developer states, "The purpose [of the PIP credits] is to maximize resources available to the Developer to complete the Project in a timely fashion." (Letter of Edward J. Quinn, Jr., Esq., Ex. E, June 6, 2000.)

The Agency also has paid approximately \$ 298,500 in "site assembly" costs associated with the acquisition of the property, including legal fees, appraisers, engineering and tenant relocation costs. The Agency argues that its "absorption of a portion of the Project Site assembly costs does not convert the

⁵ In fact, under the terms and conditions of the King City Revolving Loan Fund, Developer plans to sell the Project within two years following its completion. The net sale proceeds will be used to discharge the loan.

⁶ Although not required for a determination in this case, it should be noted that this Department does not agree with the Agency's premise that, under *McIntosh*, prevailing wage requirements are not triggered where a public entity sells land for less than fair market value under a contract for construction. Under some circumstances, the Department would find that a below-market sale of public property would constitute payment for construction with public funds.

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Project into a 'public work' because the Agency's right to charge the Developer for all site assembly costs is 'not an available pecuniary resource like cash or some readily cash-convertible asset,' and does not amount to an Agency obligation to make payment out of 'public funds' for 'construction.' (McIntosh, *supra*, at p. 1588.)" This argument is not persuasive. The McIntosh decision held that a county's waiver or forbearance of payments otherwise owed it was not the payment of public funds. Here, the Agency "absorption" is a direct payment for the above-listed costs. Furthermore, Agency draws an artificial distinction between costs it alleges are associated only with site acquisition and those associated with "construction of the Project." The payments here are for activities integrally connected to the construction of the Project and without which the Project could not have been developed. Accordingly, the Agency's payment of these costs constitutes payment for construction out of public funds within the meaning of section 1720(a).

To summarize, Agency paid public funds for the construction of the Project when it paid directly for site assembly costs and when it gave Developer free land through its PIP.

Finally, Agency requests that, if the Department determines that any portion of the Project is a public work, the Department should determine that the public works portion is severable from the private portion of the project. (Letter of Edward J. Quinn, Jr., Esq., March 30, 2000, p. 13.) Agency does not, however, indicate which portions of the Project it deems severable for this purpose, and in fact, there does not appear to be any basis for severance. The Project is being constructed on a specific Project Site by a single Developer as a physically integrated whole under a single DDA with common funding. As such, the Town Square development is a single public works project for which prevailing wages must be paid.

Sincerely,



Stephen J. Smith
Director

cc: Daniel M. Curtin
Chief Deputy Director